

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DALLAS DRUMMOND,)
) No. 594, 2010
Defendant Below,)
Appellant,) Court Below: Superior Court
) of the State of Delaware in
v.) and for Kent County
)
STATE OF DELAWARE,) Cr. No. 1001018697
)
Plaintiff Below,)
Appellee.)

Submitted: February 23, 2011

Decided: March 3, 2011

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

ORDER

This 3rd day of March 2011, it appears to the Court that:

(1) A jury convicted Dallas Drummond for burglary second degree, theft, theft by false pretenses, and criminal trespass third degree. As part of his sentence, Drummond, a habitual offender, received life imprisonment. Drummond now appeals his convictions. Because the trial judge permitted Drummond to proceed *pro se* at trial without sufficiently establishing that Drummond knowingly and voluntarily waived his constitutional right to counsel, we reverse and remand for a new trial.

(2) The State charged Drummond by indictment. After the State presented its case, and against the advice of his lawyer, Drummond elected to

testify. The trial judge informed Drummond that he would only be able to respond to questions the prosecutor and defense attorney might ask him. The judge clarified for Drummond that he could not, as he desired, “speak and let the Courts know what the truth is and what [he] fe[lt] about [him]self and what [he has] been through and what [he has] done wrong in society.”¹ In response, Drummond stated:

Okay. Basically, I just wanted to ask is that it’s my life that’s on the line here, and I don’t feel as though that it’s, like, properly correct to not let me speak to the Courts and to the jurors, so I would really like to fire counsel at this moment.

The trial judge denied this request.

(3) The prosecutor suggested to the judge that this Court’s precedent indicated that Drummond had an absolute right to proceed *pro se* if “he chooses to do so provided the [judge] is satisfied he’s capable of doing it mentally and educational-wise.” The judge, after a brief exchange with the prosecutor and defense attorney, decided to question Drummond about his professed desire to proceed *pro se*. After explaining how the trial would proceed if Drummond were to decide to proceed *pro se*, the judge told Drummond bluntly that proceeding *pro se* was “entirely opposite” to what the judge thought gave Drummond the best chance for success. The following exchange then occurred:

¹ Tr. B69: 18–21.

Judge: I'm asking you a question. Do you understand that if this is what your option is, that it is your choice to do this? And if you do this, don't go complaining about the fact that you didn't have counsel because you've got counsel and you're the one saying that you don't want him. And as has been suggested, Mr. Deely will stay here, and if you have questions, you can ask him for assistance in that context.

Do you understand that's the way it's going to go?

Drummond: Yes, Your Honor.

Judge: There we go. All right. You can proceed without counsel. It's time for the defense to go forward.²

(4) Drummond presented his case. He testified in narrative form, and he made a closing argument. The jury found him guilty of all charges, and the judge sentenced him to life imprisonment as a habitual offender pursuant to 11 *Del. C.* § 4214(b).³

² *Id.* at B79:21–B80:11.

³ 11 *Del. C.* 4214. Habitual criminal; life sentence

...
(b) Any person who has been 2 times convicted of a felony or an attempt to commit a felony hereinafter specifically named, under the laws of this State, and/or any other state, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent felony hereinafter specifically named, or an attempt to commit such specific felony, is declared to be an habitual criminal, and the court in which such third or subsequent conviction is had, in imposing sentence, shall impose a life sentence upon the person so convicted unless the subsequent felony conviction requires or allows and results in the imposition of capital punishment. Such sentence shall not be subject to the probation or parole provisions of Chapter 43 of this title.

The provision then provides a list all of the felonies to which it applies, which includes second degree burglary.

(5) We review *de novo* an asserted denial of the constitutional Sixth Amendment right to waive counsel and continue *pro se*.⁴ Criminal defendants have the right to waive counsel and continue *pro se* if they do it “knowingly, intelligently, and voluntarily.”⁵ Whether a defendant has intelligently waived the right to counsel depends upon the particular facts and circumstances of the case, including the defendant’s background, experience, and conduct of the defendant.⁶

(6) Our precedent has made clear that before a trial judge may permit a defendant to waive his right to counsel and represent himself, the judge must: (1) “determine that the defendant has made a knowing and voluntary waiver of his constitutional right to counsel,” and, (2) “inform the defendant of the risks inherent in going forward in a criminal trial without the assistance of legal counsel.”⁷ To accomplish these requirements, the judge must “conduct a hearing to inquire into the defendant’s decision, warn the defendant of the dangers and disadvantages of self-representation, and establish a record that the defendant knows what he is doing.”⁸ We require this hearing so the defendant can establish on the record that

⁴ *Smith v. State*, 996 A.2d 786, 790 (Del. 2010) (citing *Boyer v. State*, 985 A.2d 389, 2009 WL 3841973, at *1 (Del. 2009) (ORDER)).

⁵ *Id.* at 789–90. (quoting *Boyer*, 2009 WL 3841973, at *1).

⁶ *Id.* at 790. (quoting *Briscoe v. State*, 606 A.2d 103, 107 (Del. 1992)).

⁷ *Id.* (quoting *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996)).

⁸ *Id.* (citing *Boyer*, 2009 WL 3841973, at *1).

he is waiving his right to counsel intelligently and voluntarily.⁹ The judge should also advise the defendant of certain critical facts known as the *Briscoe* factors:

- (1) he will have to conduct his defense in accordance with the rules of evidence and criminal procedure, rules with which he may not be familiar;
- (2) he may be hampered in presenting his best defense by his lack of knowledge of the law;
- (3) the effectiveness of his defense may well be diminished by his dual role as attorney and accused;
- (4) the nature of the charges;
- (5) the statutory offenses included within them;
- (6) the range of allowable punishments thereunder;
- (7) possible defenses to the charges and circumstances in mitigation thereof; and
- (8) all other facts essential to a broad understanding of the whole matter.¹⁰

A defendant can knowingly and intelligently waive his Sixth Amendment right to counsel even if the judge does not review each of the *Briscoe* factors *in haec verba*.¹¹ Nevertheless, the fact that a defendant tells the trial judge that he is aware

⁹ *Id.* (citing *Watson v. State*, 564 A.2d 1107, 1109 (Del. 1989)).

¹⁰ *Id.* (citing *Briscoe*, 606 A.2d at 108).

¹¹ *Id.* at 792.

of his right to counsel and desires to waive that right does not eviscerate the judge's responsibility to conduct a "searching inquiry."¹²

(7) In this case, the trial judge did not conduct a sufficiently "searching inquiry." We held in *Smith* that the judge conducted an insufficient inquiry when he addressed "several . . . but not all" of the *Briscoe* factors with the defendant and the defendant was nonresponsive.¹³ Here, to the extent the trial judge addressed any of the eight *Briscoe* factors with Drummond, he did so either during their dialogue concerning Drummond's decision to testify—as opposed to the colloquy concerning his waiver of his right to counsel—or during the statement he made to Drummond, disapproving Drummond's decision as "entirely opposite" his own thoughts on the matter. He never addressed any of the *Briscoe* factors with Drummond explicitly and he did not ascertain enough information to establish a basis for a knowing and intelligent mid-trial waiver of Drummond's right to counsel.¹⁴

(8) The State confesses error in this case and argues that we should reverse Drummond's convictions and remand this case for a new trial. While this confession of error alone does not require us to reverse Drummond's convictions, we have made an independent determination that the trial judge committed

¹² *Id.* at 791 (quoting *Briscoe*, 606 A.2d at 107).

¹³ *Id.*

¹⁴ *See id.* at 792.

reversible error here.¹⁵ The trial judge's inquiry did not establish that Drummond waived his Sixth Amendment right to counsel knowingly, intelligently, and voluntarily.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED and REMANDED for further proceedings consistent with this Order.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

¹⁵ See *Weddington v. State*, 545 A.2d 607, 612 (Del. 1988).